No. 87-1886

In the Supreme Court of the United States

OCTOBER TERM, 1987

HYMAN GREENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

12pp

QUESTIONS PRESENTED

1. Whether the materiality of false statements and false claims under 18 U.S.C. (& Supp. IV) 287 and 1001 is a question to be decided by the court rather than by the jury.

2. Whether materiality is an element of offenses under 18 U.S.C. (& Supp. IV) 287 and 1001.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Statutes:

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1886

HYMAN GREENBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 842 F.2d 1293 (Table).

JURISDICTION

The judgment of the court of appeals was entered on March 8, 1988. The petition for a writ of certiorari was filed on May 7, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted of conspiring to submit a false claim to the government and to make false statements to the government, in violation of 18 U.S.C. (& Supp. IV) 287, 371, and 1001.[1] He

[1] Petitioner was acquitted on eight counts of aiding and abetting the submission of false statements to the government, in violation of 18

was sentenced to 18 months' imprisonment. The court of appeals affirmed (Pet. App. 1a-9a).

1. The evidence at trial showed that petitioner, along with co-defendants Bernard Bosch, Bruno Holst, and Atlantic Hardware and Supply Company (Atlantic), conspired to furnish a false claim and false information to the government in an attempt to secure payment on a contract from whose terms petitioner and his company had deviated without the approval of the government. Petitioner was the president of Atlantic. Co-defendants Bosch and Holst ran the company's government contract business.

In the summer of 1984, the Federal Supply Service Center (FSSC) of the General Services Administration (GSA) solicited bids for the supply of medical tool kits to the government. The bid request specified that each kit was to contain, among other things, a particular multimeter made by the John Fluke Mfg. Co. or the equivalent of that multimeter. Atlantic initially submitted a bid of $609 for the medical tool kit contract, a price that included $152.32 for the Fluke multimeter. Atlantic subsequently lowered its bid to $502, after co-defendant Bosch informed petitioner that he had found a different but allegedly equivalent multimeter that cost only $63. Atlantic, however, did not inform the FSSC that the bid contemplated furnishing a different multimeter, and the bid did not contain documentation showing that the multimeter was "equal to" the Fluke multimeter. Pet. App. 3a.

The FSSC accepted Atlantic's $502 bid. When the company began to order the various items for the kit, it learned

---

U.S.C. 1001. Co-defendants Bernard Bosch, Bruno Holst, Eric Wallace Gingold, and Atlantic Hardware and Supply Corporation pleaded guilty.

that the multimeter in its bid was not in fact equivalent to the Fluke multimeter. Bosch then located a third multimeter, this one manufactured by Sperry. The Sperry device, however, did not have all the features of the Fluke multimeter, and it cost less than the version that was included in Atlantic's bid. Although the bid specifications became part of the contract between the government and Atlantic, neither petitioner nor anyone else at Atlantic informed the FSSC of the change or of the fact that the Sperry multimeter did not conform to the specifications in the FSSC bid request. Pet. App. 3a-4a.

In late 1984, when a GSA inspector visited Atlantic to inspect preproduction samples of the tool kit, Bosch persuaded the inspector that the Sperry multimeter was equivalent to the Fluke version called for by the FSSC. The distributor of the Fluke multimeter subsequently advised the inspector's superior that Atlantic had not ordered any Fluke multimeters. As a result, the GSA supervisor told Bosch that Atlantic would have to submit a formal request for deviation from the terms of the solicitation. Bosch thereupon suggested to petitioner that Atlantic offer the government a $40 rebate, but petitioner told Bosch to submit only a $6.50 rebate. Accordingly, with petitioner's knowledge, Bosch forged invoices from another company to inflate the price of the Sperry multimeter to $132.50, more than twice its true value (but within $6.50 of a recent price quote on the Fluke product). Pet. App. 4a, 9a.

In March 1985, Atlantic sent 60 tool kits containing Sperry multimeters to the GSA for final approval. A short time later, the company submitted a bill for payment on the kits. GSA rejected Atlantic's request for a deviation from the contract and referred the matter for prosecution. Pet. App. 4a-5a.

The charges against petitioner rested on the submission of the claim for payment and the submission of false test reports to the GSA inspector. At trial, petitioner unsuccessfully urged the district court to instruct the jury that it had to determine whether petitioner's allegedly false statements were material. Instead, the trial judge held that petitioner's statements were material as a matter of law. Pet. 5-6.

2. On appeal after conviction, petitioner argued that the materiality of his allegedly false statements should have been determined by the jury. The court of appeals rejected that contention, holding that materiality was a question of law. Pet. App. 8a. The court separately observed (*id.* at 8a n.2) that, although some courts had held that materiality is not an element of an offense under 18 U.S.C. (& Supp. IV) 287, it would not decide that question because, even if those courts were wrong, materiality would be a question for the court under 18 U.S.C. (& Supp. IV) 287, as under 18 U.S.C. 1001.[2]

ARGUMENT

1. Petitioner first contends (Pet. 7-10) that the question of materiality under 18 U.S.C. (& Supp. IV) 287 and 1001 is a factual question for the jury, not a legal question for the court. The court below correctly rejected that contention.

The great majority of the courts of appeals have held that materiality under Section 1001 is a question of law

---

[2] The court also rejected petitioner's claims that venue was not proper in the Eastern District of Virginia, that the trial court improperly instructed the jury on the knowledge required for conviction, that the prosecutor improperly vouched for a government witness and withheld exculpatory information, and that there was insufficient evidence to sustain his conviction (Pet. App. 5a-9a). Petitioner does not renew any of those contentions in this Court.

for the court rather than one of fact for the jury, and this Court has repeatedly declined to review those decisions. See, *e.g.*, *United States* v. *Holley*, 826 F.2d 331, 335 (5th Cir. 1987), cert. denied, No. 87-982 (Mar. 21, 1988); *United States* v. *Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States* v. *Keefer*, 799 F.2d 1115, 1126 (6th Cir. 1986); *United States* v. *Greenwood*, 796 F.2d 49, 55 (4th Cir. 1986); *United States* v. *Brantley*, 786 F.2d 1322, 1327 (7th Cir.), cert. denied, 477 U.S. 908 (1986); *United States* v. *Hansen*, 772 F.2d 940, 950 (D.C. Cir. 1985), cert. denied, 475 U.S. 1045 (1986); *United States* v. *Greber*, 760 F.2d 68, 72-73 (3d Cir.), cert. denied, 474 U.S. 988 (1985); *Nilson Van & Storage Co.* v. *Marsh*, 755 F.2d 362, 367 (4th Cir.), cert. denied, 474 U.S. 818 (1985); *United States* v. *Lopez*, 728 F.2d 1359, 1362 n.4 (11th Cir.), cert. denied, 469 U.S. 828 (1984); *United States* v. *Abadi*, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983); *United States* v. *Richmond*, 700 F.2d 1183, 1188 (8th Cir. 1983); *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *United States* v. *Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980); *United States* v. *Bernard*, 384 F.2d 915, 916 (2d Cir. 1967).[3]

With respect to Section 287, all of the courts of appeals that have addressed the issue of materiality have held that it is a question of law or that materiality is not an element of a Section 287 violation at all. *United States* v. *Elkin*, 731 F.2d 1005, 1009-1010 (2d Cir.), cert. denied, 469 U.S. 822 (1984); *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Adler*, 623 F.2d at 1291 n.5, 1292; *United States* v. *Haynie*, 568 F.2d 1091, 1092 (5th Cir. 1978). See

---

[3] The Court denied a petition for a writ of certiorari raising this issue only last month. *Gibson* v. *United States*, cert. denied, No. 87-6426 (May 16, 1988).

also 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 28.09 (3d ed. 1977 & Supp. 1987).

This array of authority treating materiality as an issue of law accords with this Court's recognition in *Sinclair* v. *United States*, 279 U.S. 263, 298 (1929), that the materiality of false statements generally is a question for the court. That understanding was recently reaffirmed in *Kungys* v. *United States*, No. 86-228 (May 2, 1988). The Court there held (slip op. 10) that the issue of materiality under 8 U.S.C. 1451 is a legal question. In so holding, the Court quoted with approval the Sixth Circuit's *Abadi* decision holding materiality to be a legal question under 18 U.S.C. 1001.

As petitioner points out (Pet. 8), the Ninth and Tenth Circuits have in several decisions taken a different position on materiality under 18 U.S.C. 1001. See *United States* v. *Irwin*, 654 F.2d at 677 n.8; *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979).[4] Those decisions, however, do not create a conflict warranting this Court's review. First, neither circuit has addressed the question since this Court's decision in *Kungys*, and both courts have declined to extend the rulings on Section 1001 to other statutes involving the issue of materiality.[5] Accordingly, both cir-

---

[4] Petitioner points to no conflict on whether materiality under 18 U.S.C. (& Supp. IV) 287 is a question of law. Indeed, as noted above, the Tenth Circuit in *Irwin* held materiality under that provision to be a question of law, even though it held materiality under Section 1001 to be a factual question for the jury.

[5] Thus, in several recent decisions applying statutes other than 18 U.S.C. 1001, the Ninth Circuit has held that materiality is an issue of law to be decided by the court. See *United States* v. *Martinez*, 837 F.2d 900, 902 (1988); *United States* v. *Larm*, 824 F.2d 780, 783-784 (1987), cert. denied, No. 87-907 (Feb. 22, 1988); *United States* v. *Flake*, 746 F.2d 535, 537 (1984), cert. denied, 469 U.S. 1225 (1985); *United States* v. *Prantil*, 764 F.2d 548, 557 (1985). And the Tenth Cir-

cuits can be expected to reconsider the matter in light of this Court's recent decision in *Kungys*. Moreover, to our knowledge, neither circuit has actually overturned a conviction under Section 1001 on the ground that the issue was not submitted to the jury. The Ninth Circuit has twice held that a trial court erred in not submitting the issue to the jury, but in both cases the court affirmed the convictions because it was clear that the statements at issue were material. *United States* v. *Valdez*, 594 F.2d at 728-729; *United States* v. *East*, 416 F.2d 351, 354-355 (1969). The Tenth Circuit has approved the practice of submitting the issue of materiality to the jury, but it has not considered whether it is reversible error for a trial court to decide the issue itself. See *United States* v. *Irwin*, 654 F.2d at 677 n.8 and cases cited therein.[6]

In any event, the statements and claims in this case were material beyond any doubt. The false test reports were submitted to the GSA inspector, whose approval was part of the FSSC contracting process (Pet. App. 3a), and the false claim for payment for the Sperry multimeter was submitted under a contract requiring provision of a Fluke

---

cuit has recently held that materiality in a perjury case is a question for the court. *United States* v. *Larranaga*, 787 F.2d 489, 494 & n.1 (1986). The court there acknowledged that materiality is properly treated as an issue of law under 26 U.S.C. 7206(1), which covers the filing of false tax returns, and stated: "[w]e need not determine today whether we should continue to treat § 1001 in [a contrary] fashion" (787 F.2d at 494 n.1).

[6] Of course, if, as the Second Circuit has concluded with respect to Section 1001 as well as Section 287 (*United States* v. *Elkin*, 731 F.2d 1005, 1009, cert. denied, 469 U.S. 822 (1984)), and as the Tenth and Fifth Circuits have concluded with respect to Section 287 (*United States* v. *Irwin, supra*; *United States* v. *Haynie, supra*), materiality is not an element of the offense at all, any variation among the circuits on the materiality issue is entirely academic, since there is no need for the issue of materiality to be addressed by either the court or the jury.

multimeter or its equivalent. Because they were "designed * * * to induce payment," the false claims and statements in this case "undoubtedly were material" (*United States* v. *Larm*, 824 F.2d at 784). Accordingly, any error in the district court's deciding the issue of materiality itself was harmless.

2. Petitioner also contends (Pet. 10-13) that materiality is an element of both 18 U.S.C. (& Supp. IV) 287 and 18 U.S.C. 1001. That contention raises a question not presented by this case, because the court of appeals did not rule contrary to petitioner's position. The court did not even question whether materiality is an element of an offense under 18 U.S.C. 1001, and it expressly declined to decide the question under 18 U.S.C. (& Supp. IV) 287. Instead, the court assumed, in agreement with petitioner, that materiality is an element of an offense under that statute. Pet. App. 8a n.2.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Acting Assistant Attorney General
LOUIS M. FISCHER
Attorney

JUNE 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988—202 037/60524